Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation, Transferor to SBC Communications Inc., Transferee	)	CC Docket No. 98-141
	)	
Common Carrier Bureau and Office of Engineering and Technology Announce Public Forum on Competitive Access to Next-Generation Remote Terminals	)	NSD-L-00-48 DA 00-891
	)	
Association for Local Telecommunications Services Petition for Declaratory Ruling: Broadband Loop Provisioning	)	DA 00-1141

REPLY COMMENTS OF COVAD COMMUNICATIONS COMPANY

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Introduction

ALTS has asked the Commission to clarify what the rule requiring nondiscriminatory access to unbundled local loops actually means. By highlighting the evidentiary battles in the section 271 proceedings to date, the troubles with enforcement of loop provisioning problems, and the difficulties in establishing what "parity" and "nondiscrimination" mean in the loop context, ALTS has highlighted a large number of problems with the current lack of definitional certainty. There is thus a great deal of "uncertainty in the law" that cries out for immediate Commission clarification.[1] In the context of its review of Section 271 applications, the Commission has already determined that, where no retail analogue exists for a UNE, "the incumbent must provide access in a manner that allows an equally efficient competitor a 'meaningful opportunity to compete.'"[2] That standard, however, is only relevant to competition in a particular incumbent LEC territory if the incumbent is both a BOC *and* chooses to pursue a Section 271 application.[3]

In order to protect the ability of competitive LECs seeking to offer advanced services over unbundled local loops, ALTS has proposed that the Commission provide further clarification to its definition of the incumbent LECs' existing loop unbundling obligations. Specifically, the ALTS petition proposes the adoption of a national loop

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[1] SBC Comments at 1.

[2] SBC Comments at 19, quoting *Ameritech Michigan 271 Order* at para. 130.

[3] A substantial percentage of the United States is served by incumbent LECs that are not one of the four RBOCs. In addition, only two Section 271 applications have been filed before the Commission in the last year, for states representing a significant minority of the U.S. population. (In addition, to this date, U S WEST has not filed one 271 application before the Commission.) The Commission is charged with ensuring the development of competitive markets and deployment of advanced services *throughout* the United States. It would be a startling abdication of the Commission's "public interest" authority to accord consumers in non-RBOC regions an inferior level of competitive entry, or to depend on the individualistic

provisioning interval, pursuant to the Commission's existing authority to interpret section 251(c)(3) of the Act. As emphasized in greater detail in Covad's initial comments, such a national interval will end uncertainty in the section 271 process, promote rapid and effective enforcement, and will jump-start the opening of local markets to competition. Such an interpretation is not, as the incumbent LECs argue, beyond the Commission's authority.

Incumbent "procedural" arguments are thinly veiled efforts to block competition

The comments of incumbent LECs in response to the ALTS petition for a declaratory ruling are, true to form, a repetition of the exact same arguments raised by the exact same incumbents in opposition to every pro-competitive rule considered by the Commission. In a surprise move, incumbent LECs without exception argue that the Commission lacks authority to adopt a loop provisioning benchmark. There are various forms of attack, ranging from the argument that the Commission has not provided proper notice for adoption of such a benchmark[4] to the procedural defectiveness of a "rule" adopted in a petition for declaratory ruling. As has been the case for more than four years, these incumbents are grasping wildly for any argument they can raise in opposition to a Commission action that will further, rather than hinder, competition. It is telling that incumbent LECs all chose to lead their oppositions with this procedural gambit, hoping that their lack of substantive opposition would not shine through.

Section 271 timelines (in which entry in one state may be accelerated to the detriment of other states) for adequate enforcement.

[4] BellSouth Comments at 1 (ALTS petition submitted "without benefit of notice, opportunity to comment") (apparently missing the words "PUBLIC NOTICE" in 48 point font at the top of the Commission's notice to the public that parties should submit comment on the ALTS petition). It is indeed odd that the incumbent LECs make this argument in the very same pleadings within which they launch substantive attacks against the adoption of the benchmark they claim no procedural ability to counter.

The Commission has authority to issue this declaratory ruling

The Commission clearly has the authority to interpret the meaning of the statutory phrase "nondiscriminatory access to network elements" used in section 251(c)(3) of the Act.[5] Section 251 of the Act empowers the Commission to implement rules in furtherance of Congress's unbundling and interconnection mandates. The Commission has never, despite Bell Atlantic's suggestion, "recognized [that] State commissions are in the best position to develop specific UNE provisioning requirements."[6] To the contrary, the Commission has since 1996 established concrete UNE provisioning rules and made clear that such rules were a floor, not a ceiling, and that State commissions are free to adopt more rigorous provisioning rules.[7] This is hardly, as Bell Atlantic would have us believe, a "recognition" that provisioning requirements have always been left to the states.[8]

Bell Atlantic launches an attack on the use of a declaratory ruling petition to request a loop provisioning benchmark.[9] Bell Atlantic notes that the Administrative Procedure Act (APA) authorizes a federal agency to "issue a declaratory order only to

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[5] 47 U.S.C. sec. 251(c)(3). *See also AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (noting Commission's authority pursuant to section 201(b) of the Act to implement rules in furtherance of local competition).

[6] Bell Atlantic Comments at 2.

[7] *Local Competition First Report and Order* at para. 58 ("We agree generally that many of the rules we adopt should establish non-exhaustive requirements, and that states may impose additional pro-competitive requirements that are consistent with the purposes and terms of the 1996 Act, including our regulations established pursuant to section 251.").

[8] Bell Atlantic Comments at 2. Indeed, if the Commission *had* indeed unilaterally delegated such authority to the states, that Commission decision itself may be subject to legal challenge—on the grounds that the Commission may not delegate to or commandeer state commission resources to implement federal policy. Such a decision would be particularly taboo (and would violate the Act) if the Commission delegated authority regarding the provisioning of interstate telecommunications services.

[9] Bell Atlantic Comments at 3.

terminate a controversy or remove uncertainty."[10] As Bell Atlantic helpfully points out, both of these permissible uses of the declaratory ruling are applicable in the instant matter. First, as Covad and other commenters argued in extensive detail, there is a great deal of controversy surrounding the appropriate benchmark for measuring loop provisioning intervals. This controversy has arisen in the context of section 271 applications, where the Commission has been forced to deal with a slew of ever-changing and conflicting data. In addition, the recent establishment of other "performance measurement" systems in the context of the SBC-Ameritech and Bell Atlantic-GTE mergers—which are not necessarily consistent with the measurements developed by those same incumbent LECs in 271 proceedings—leads to further controversy and confusion.

Clearly, in the context of Section 271 applications and RBOC merger conditions, the Commission believes that measuring loop provisioning intervals in an attempt to determine compliance is in the public interest. What is *not* in the public interest is the development of separate, side-by-side "performance measurement" systems, generated for different purposes (perhaps from different databases), that vary state-by-state, and which only "cover" certain incumbent LECs.

The Commission has never "decided" not to adopt federal provisioning rules

In a truly incredible misrepresentation, Bell Atlantic contends that the Commission has made a "previous decision *not* to adopt federal performance standards."[11] In what Bell Atlantic calls the "Performance Order,"[12] the incumbent contends that the Commission has affirmatively determined that federal provisioning

[10] Bell Atlantic Comments at 3, quoting 5 U.S.C. sec. 554(e).
[11] Bell Atlantic Comments at 3.

rules are inappropriate, and the ALTS petition is therefore "procedurally defective" because it "conflicts with the Commission's prior decision."[13] Bell Atlantic clearly missed – or deliberately ignored[14] – the fact that what it calls the "Performance Order" was in reality a Notice of Proposed Rulemaking (NPRM) in which the Commission "propose[d] a methodology by which to analyze whether new providers of local telephone service are able to access . . . the support functions . . . of incumbent local telephone companies in a nondiscriminatory and just and reasonable manner consistent with the 1996 Act's requirements."[15] Far from concluding that national loop provisioning intervals were inappropriate, the Commission tentatively concluded that it should "adopt model performance measures and reporting requirements" – including several new performance measures for unbundled loops.[16]

Second, the Commission has always reserved the right to impose additional, more detailed provisioning rules "in order to reflect developments in the dynamic telecommunications industry."[17] The mere fact that states could adopt loop performance

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[12] Bell Atlantic Comments at 4.

[13] Bell Atlantic Comments at 3-4.

[14] Clearly, Bell Atlantic has an incentive to ensure that states, not the Commission, are left to adopt loop provisioning intervals – only a small percentage of states have done so, and Bell Atlantic and its incumbent brethren prefer it that way.

[15] *Performance Measures NPRM* at para. 3.

[16] *Performance Measures NPRM* at paras. 50, 57. Bell Atlantic also contends that the Commission concluded in the "Performance Order" that it was not appropriate to adopt any performance standards because it was proper for states to adopt such standards. Bell Atlantic Comments at 4-5. The portions of the "Order" Bell Atlantic quotes miss (or avoid) what the Commission actually stated as a reason for not adopting performance standards – it wanted a fuller record. The full text of the Commission's statement, rather than Bell Atlantic's edited version, makes this clear. "Although we believe that it is appropriate to consider how performance standards might be used, we tentatively conclude that it is premature at this time for us to propose specific standards. We understand that several states are considering performance standards and encourage states in these efforts. Nevertheless, we do not believe that we have developed a sufficient record to consider proposing performance standards at this time." *Performance Measures NPRM* at para. 125. Thus, the Commission did not adopt performance measures at that time because it wanted a fuller record on the subject, not (as Bell Atlantic would have us believe) because it thought they were a bad idea.

[17] *Local Competition First Report and Order* at para. 59 ("We recognize that it is vital that we reexamine our rules over time in order to reflect developments in the dynamic telecommunications industry. We

measures, or have already done so, in no way eliminates the need for a strict federal rule. State performance measures that do address loop provisioning generally compare it to loop data from the incumbent to ensure "nondiscriminatory" loop provisioning. As detailed in Covad's initial comments, such a comparison can be anticompetitive, because it permits the monopolist to hamper innovation by ensuring that all carriers – incumbent and competitive LECs alike – are wedded to the monopolist's poor customer service practices.[18] The performance measures adopted by states cannot ensure timely provisioning of loops – they simply measure how long it takes to provide loops.[19] Parity in this instance means parity of lousy service. As a result, the current practice of measuring performance would benefit greatly from a federal benchmark for loop provisioning – it would facilitate the comparison process and ensure that customers of all carriers benefit from competition and innovation.

The adoption of a federal loop provisioning interval will not "usurp" the role of state commissions in fostering local competition

SBC contends that the Commission has long left determination of loop provisioning compliance to state commissions because of their particular expertise in the

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cannot anticipate all of the changes that will occur as a result of technological advancements, competitive developments, and practical experience, particularly at the state level. Therefore, ongoing review of our rules is inevitable.").

[18] Covad Comments at 11-12. In addition, a "parity" standard ties the CLEC's fortunes to the retail deployment plans of the incumbent. For instance, if the incumbent only chooses to provide ADSL service via line-sharing, a parity standard essentially leaves out a basis for assessing performance on stand-alone loops ordered by CLECs to support SDSL or other advanced services. In the absence of an effective, clear and measurable standard, CLECs will be denied "nondiscriminatory" access.

[19] Thus, Bell Atlantic argues that "States have developed and are continuing to develop comprehensive regulatory regimes which monitor incumbent carriers' performance for provisioning UNEs." Bell Atlantic Comments at 9. As a result, Bell Atlantic contends that the Commission "should refrain from usurping the role already being performed by the State commissions . . . ." *Id.* To the contrary, the establishment of a federal loop provisioning interval would enhance the work of the state commissions by ensuring that all states use the same benchmark for loop performance. In addition, state commissions would be able to tie incumbent LEC performance to a concrete federal rule that interprets what "nondiscriminatory" means, rather than attempting to develop their own standards or tying it to the performance of the incumbent. Federal provisioning intervals would thus be of enormous assistance to the state commissions.

arena.[20] SBC suggests that the Commission should not usurp the state role "to police the nondiscrimination requirement."[21] Nothing in the ALTS proposal would require any change to the present system – indeed, the ALTS proposal greatly enhances its effectiveness. The state commission has an important role, as SBC correctly points out, in setting metrics and performance measures.[22] Those metrics and performance measures are set by states, but they are implementations of federal rules, including UNE access and technical parameter rules. As a result, state commissions struggling to implement loop provisioning metrics and performance measures would be greatly aided by a federal benchmark. Rather than relying entirely on amorphous standards that subject incumbent and competitive LECs to widely disparate performance requirements, states will be able to implement more uniform obligations (using the federal benchmark as a floor, not a ceiling). The federal-state partnership remains in full force, with the Commission providing the states an additional tool to facilitate the states' ability to ensure competitive LECs have access to loops in a timely manner.

No "differences" among incumbent LECs prevent adoption of a national rule

The Commission can greatly advance its obligation and goal of promoting the deployment of competitive advanced services[23] by clearly articulating a national, minimum loop provisioning interval. As predicted,[24] Bell Atlantic urges that a national loop provisioning interval is inappropriate because incumbent LECs "are not alike" and because an incumbent "operating in the mountains of West Virginia clearly faces

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[20] SBC Comments at 24-5.
[21] SBC Comments at 24.
[22] SBC Comments at 24.
[23] Many of which are interstate services, over which the Commission has plenary authority.
[24] Covad Comments at 9 ("In their zeal to avoid the destruction of their favorite tool of discrimination, incumbent LECs will likely argue – as they do in opposition to every federal rule – that there are regional differences in loops that would make a federal provisioning interval unworkable.").

different operational challenges and local conditions than an incumbent operating in the plains of Iowa or on the crowded streets of New York City."[25] Not only would Bell Atlantic have no idea what challenges face a LEC operating in Iowa – because it has never bothered to try to compete out of its own monopoly territory– but Bell Atlantic completely fails to argue (again as predicted)[26] *what exactly those differences are*. Other than vague references to "different network configurations, operational systems and processes, methods and procedures," Bell Atlantic cannot come up with a signal reason why it cannot comply with a federal requirement that it provide loops to competitors in a timely manner.[27] There is the usual excess of rhetoric that the Commission has seen in opposition to line sharing, sub-loop unbundling, and cageless collocation – but the Commission has properly rejected the exact same argument in each of the market-opening proceedings it has undertaken. The only reason an incumbent LEC could not meet a loop provisioning interval is because it does not want to.

Incumbents cannot hide behind "parity" and a refusal to "provide a superior service to competitors" to avoid their obligations

Bell Atlantic argues that it would be unlawful for the Commission to require any loop provisioning interval that is shorter than the interval Bell Atlantic provides itself,

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[25] Bell Atlantic Comments at 5. *See also* BellSouth's Comments at 5 ("A national standard that sets out a fixed time for loop provisioning makes no practical sense given the substantial variation between local networks across the country and the variations between urban, suburban, and rural areas.") (the entire extent of BellSouth's argument on the subject); GTE Comments at 14 ("A national standard for loop provisioning could not be established due to inherent and obvious variations in networks.") (the entire extent of GTE's argument on the subject); SBC Comments at 21 ("A single, "one size fits all" national performance standard, in contrast, would not take into account the differences in underlying incumbent networks and systems") (the entire extent of SBC's argument on the subject).

[26] Covad Comments at 10 ("Incumbent LECs have an incentive to exaggerate the regional differences of loop provisioning processes, because fighting implementation of a concrete and specific federal rule is the only means of preserving their favorite discriminatory tool.").

[27] Bell Atlantic Comments at 5. Indeed, interexchange carriers are subject to (and meet) uniform federal service quality and nationwide pricing rules—all while providing long-distance service in the "mountains of West Virginia" and the "plains of Iowa". In addition, RBOCs like Bell Atlantic and SBC have recently

because such a requirement would obligate the LEC to provide performance that is "superior" to what the incumbent provides itself.[28] Out of the other side of its mouth, Bell Atlantic concedes that in the case where a UNE has no retail analogue, the Commission determines whether a competitive LEC has a "meaningful opportunity to compete" given the incumbent's provisioning performance. As the Commission has concluded, providing of xDSL loops has no clear retail analogue – for example, incumbent LECs use line-sharing to provision their retail xDSL services, which cannot be readily compared to the provisioning of a stand-alone loop. Bell Atlantic concedes as much in its own comments, stating that "Bell Atlantic's ADSL service is not an appropriate retail analog for use in calculating performance with respect to unbundled loops."[29] Given this lack of a functional benchmark to ensure nondiscrimination, the need for a federal loop provisioning interval could not be stronger. If Bell Atlantic's "superior service" argument were correct, then the Commission would only be empowered to adopt rules that conform to existing incumbent LEC retail practices and timelines. This is clearly not the case.

Even the provisioning of the line-sharing UNE – which superficially appears to have a retail analogue -- must be subject to a federal provisioning rule. Incumbent LECs will argue that "substantially the same time and manner" means they provide the line-sharing UNE to competitors in the same time frame that they turn up service to their own retail customers – and requiring anything shorter would mean the provisioning of a "superior" network to competitors. But the UNE provisioning process and the retail

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justified their recent mega-mergers by describing the "efficiencies" of common ownership and control of disparate telephone exchanges.

[28] Bell Atlantic Comments at 10.

[29] Bell Atlantic Comments at 12.

service activation are not the same thing. Incumbent LECs may take a week to activate retail service, but such activation includes the entire customer acquisition and setup process, from ISP provisioning to customer premises installation. It is not limited to the mere provisioning of the UNE itself. Incumbent LECs tack on days to the "provisioning process", the effect of which extends the actually parity measurement longer.[30] The provisioning of the line-sharing UNE requires only cross-connect work in the central office – nothing more. Such an activity takes only a matter of minutes to perform. Covad's proposal of a two-business-day interval is more than sufficient for such work to be completed, and it ensures that competitive LECs will have a true meaningful opportunity to compete.[31]

An incumbent LEC separate affiliate cannot replace a national provisioning interval

It is interesting to note GTE's argument that its separate affiliate operated with its merger partner Bell Atlantic, as well as that of SBC/Ameritech, will serve as effective guards against loop discrimination.[32] It is particularly odd that the BA/GTE separate affiliate and the SBC/Ameritech separate affiliate have yet to raise their voices in protest to such an assertion. Because, according to the incumbent LECs, their affiliates order

[30] The time to coordinate the order with an ISP, or to arrange and perform a "truck roll" for customer installation or inside wiring will add days to the ILEC's "retail ADSL" installation interval. CLECs like Covad have to undertake those steps as well. For example, assume that for its retail ADSL service, the ILEC performs the central office cross-connect the first business day after it receives an ADSL order (this is generally all the work that is required to provide line-sharing to a CLEC). The ILEC may then take five business days to arrange a truck roll to perform inside wiring or other work at the customer premises. Under the "parity" standard argued for by ILECs, that additional week will be added to its "installation interval". As a result, the ILEC will be excused from providing line-shared loops to a CLEC within six business days—and the CLEC still has to coordinate installation and possibly a truck roll. In this sense, the "parity" standard advocated by ILECs would, in reality, *codify and permit* overtly discriminatory provisioning.

[31] Indeed, in a decision issued just days ago, a Pennsylvania PUC ALJ ruled in favor of Covad and other competitive LECs, ordering Bell Atlantic to provide the linesharing UNE within *one business day* by December 7, 2000. Under Covad's proposal, such additional state commission standards would be permitted.

loops just as any other competitive LEC, and because (again, according to the incumbent LECs) those affiliates are treated in exactly the same manner as competitive LECs, the affiliates should have exactly the same problems with loop provisioning as the rest of the data CLECs. Indeed, because ALTS represents every single major competitive LEC providing DSL service, the industry is uniform in its plea for federal loop provisioning intervals – with the exception of the incumbent LEC affiliates. Strangely, GTE speaks on behalf of the BA/GTE affiliate, as does SBC on behalf of its affiliate, purporting to represent the affiliates' happiness with current incumbent loop provisioning practices. If the affiliate were truly separate and truly subject to the same provisioning practices as the rest of the industry, Covad submits that the affiliates of BA/GTE and SBC/Ameritech would be joining the loud chorus calling for federal provisioning intervals.[33]

The level of integration between the incumbent LEC and its affiliates renders the affiliate an ineffective protection against loop provisioning practices. The affiliate is not a true "wholesale" customer of incumbent loops, because the affiliate relies on the sales, maintenance, and operational services of the incumbent and the incumbent's ISP as well. As a result, the loop "interval" that the affiliate receives is inexorably linked to all other operational aspects of the service delivery process. Thus, if the incumbent affiliate "receives" its loop in seven days, and the entire service provisioning process undertaken by the incumbent on behalf on its affiliate (ISP service provisioning, OSS updates, truck roll to customer premises, etc.) is complete, the affiliate can turn up service as soon as that loop is delivered. The competitive LEC, on the other hand, can only *begin* the

[32] GTE Comments at 6. *See also* SBC Comments at 25 ("A national xDSL performance standard is especially unnecessary given that SBC and Bell Atlantic/GTE have established (or are in the process of establishing) separate affiliates for advanced services pursuant to their merger conditions.").

customer provisioning process when its gets its loop on day seven. Thus, the affiliate serves to cloud the true nature of the loop (or linesharing UNE) provisioning process, insulating the incumbent LEC from providing a meaningful opportunity for competitive LECs to compete with the affiliate, all in the name of "parity."

A national loop provisioning interval is the most procompetitive policy the Commission can adopt to further the deployment of advanced services – and to facilitate the Commission's enforcement efforts and review of sec. 271 applications

As a policy matter, there can be no question that the Commission's efforts to foster competition in the broadband industry would be greatly aided by adoption of a loop provisioning benchmark.[34] In response to this policy argument, BellSouth goes so far as to threaten the Commission, warning that a loop provisioning interval "can have a chilling effect on ILEC deployment of broadband facilities."[35] BellSouth further threatens that such an action would further the lead of cable companies in the broadband race.[36] To the contrary, the Commission's adoption of a loop provisioning interval would promote competition from within the sector of the industry that is delivering on the promise of broadband to the masses – the competitive LECs (Covad alone, for example, has more DSL customers than BellSouth, and Covad has deployed DSL in more central offices than *any* incumbent LEC). BellSouth and its incumbent LEC friends can try their "open access" rhetoric in another proceeding. BellSouth, like its incumbent brethren, sat on DSL technology for years, and did not begin to deploy it until competitors like Covad forced their hands. They will continue to sit on it as long as they can maintain their

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[33] The absence of these affiliates from this proceeding is indeed telling as to the true "separateness" of their operations.

[34] In particular, the policy would directly advance the Commission's mandate, pursuant to section 706 of the Telecommunications Act of 1996, to encourage and foster the deployment of competitive advanced services to all Americans.

[35] BellSouth Comments at 6.

[36] BellSouth Comments at 5-6.

monopoly over lucrative T-1 and ISDN services. Competitive pressure drives innovation, not monopolistic behavior. Refusing to adopt a loop provisioning interval would certainly benefit BellSouth, but would harm consumers.

In a rare act of sagacity, U S WEST actually hits on the strongest argument for adoption of a federal loop provisioning interval. U S WEST complains that ALTS has failed to provide any concrete evidence to support its claim that incumbent LECs are acting in an anticompetitive manner in provisioning loops to competitors. U S WEST states that ALTS, in fact, could not provide such evidence, because it does not exist:

> Moreover, ALTS has not even attempted to proffer any evidence to support its claim that the CLECs do not obtain loops in the same period of time that the ILECs deploy the same loops for themselves. *Nor could it do so, since there is no retail analogue to the sale of unbundled loops.*[37]

U S WEST has hit on the very core of the issue. The Commission's current approach to ensuring that incumbent LECs do not use their monopoly control over the bottleneck loop plant to suppress competition - attempting to determine whether there is "parity" and "nondiscrimination" in the provisioning of loops - is completely unworkable. As U S WEST correctly notes, there is no retail analogue to the sale of unbundled loops, making the Commission's task in determining "nondiscrimination" all but impossible under the current framework. Competitive LECs have no access to incumbent LEC retail provisioning information, incumbent LECs think it is irrelevant and refuse to provide it, and the Commission is left with no evidence, no data, no benchmarks, and only the solemn word of the incumbent LECs that they are doing everything they can to foster competition. In the case of U S WEST in particular, that RBOC has not even provided the Commission a Section 271 application, which has been, to date, the only context in

[37] U S WEST Comments at 4 (emphasis added).

which the Commission has permitted itself to dive into the dirty details of discriminatory delivery. This is why, as Covad argued in extensive detail in its Comments, the Commission has struggled with loop provisioning issues in section 271 applications and in enforcement proceedings – and will continue to struggle so long as it maintains its focus on "parity with the incumbent."

It is thus clear to incumbents and competitive LECs alike that the Commission's reliance on parity in loop provisioning is unworkable. In order to end the "he said-she said" evidentiary battles in the dozens of section 271 applications still to come, the Commission need only adopt a benchmark for loop provisioning of three business days (and two business days for the line-sharing UNE) and bring an end to the retail analogue mess. The Commission's current system places the burden perversely on the competitive LEC to prove that the incumbent is not acting in an anticompetitive manner by providing data showing that the incumbent's provisioning intervals are out of "parity" with the service the incumbent provides its own customers. Imposing such a burden on competitive LECs is a strange twist on the traditional placement of an evidentiary burden on the party that actually possesses all of the necessary information. Despite the fact that it is the incumbent, not the competitive LEC, who has all information related both to the competitive LEC loop orders (when loops were ordered and when provisioned) and the incumbent's own retail performance, the burdens of proof and persuasion are placed on the competitive LEC – the party without access to the information – to prove the incumbent's noncompliance. This twisted system – contrary to long-standing common law principles – immunizes incumbent LECs from an effective section 271 checklist challenge and from effective enforcement action, because the incumbent need only claim

that retail performance data is irrelevant, confidential, or unavailable to foreclose the competitive LEC from meeting its burden of proof.

The burden should not be on the competitive LEC, and the Commission must recognize how unworkable the section 271 and enforcement contexts have become in the absence of a loop benchmark.[38] All parties will benefit from the adoption of such a benchmark. The Commission will benefit by facilitating the section 271 review process and enforcement proceedings. Incumbent LECs will benefit by having a clear and definite benchmark by which to provide loops and measure their own performance. Competitive LECs will benefit by gaining access to loops in a timely manner, having the section 271 checklist compliance burden of proof properly placed on the incumbents, and accessing an effective and workable enforcement mechanism to remedy anticompetitive incumbent LEC loop practices. Finally, and most importantly, consumers will benefit from timely access to the widest possible varitey of innovative advanced services.

USTA suggests that the Commission's decision to seek comment on the ALTS petition was "administratively burdensome" and "costly to address."[39] Out of the other side of its mouth, USTA (representing all Bell Operating Companies) suggests that competitive LECs having difficulty with incumbent LEC anticompetitive practices should "bring complaints against any ILEC" before the 50 state commissions.[40] Pray, tell, USTA, how administratively burdensome would those proceedings be?

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[38] The clearest evidence of the dysfunction in the Commission's loop enforcement process is that incumbent LECs support it. GTE, for example, argues that allegations of anticompetitive loop provisioning practices "are best dealt with through the complaint process." GTE Comments at 3. *Also see* SBC Comments at 24 ("the proper remedy is a complaint with the state commission or the FCC").

Loop provisioning interval must include intervals for loop conditioning as well

As U S WEST concedes in its comments, incumbents LECs impose significant delays on competitors who order loops that require conditioning. U S WEST states that it is "currently averaging 24 days for loop conditioning."[41] Assuming that U S WEST is continuing its longstanding practice of counting "days" as "business days," U S WEST effectively concedes that the *average* loop order requiring conditioning is provisioned in five weeks --- a concession that the process takes well over a month. Even using U S WEST's own numbers, it is clear that competitive LECs are forced to endure incredible delays for conditioned loops. These delays, in turn, cause customers of competitive LECs to cancel service orders in huge numbers, rather than endure such a long wait for service (and a vast number of those cancelled orders end up as incumbent LEC xDSL customers).

The Commission's OSS rules are not clear enough to ensure incumbent compliance

BellSouth contends that it provides OSS access in a nondiscriminatory manner, which is all the Act requires.[42] BellSouth's belief that it is in compliance with the Commission's OSS rules is all the proof necessary that the Commission's rules are not sufficiently clear. Covad submits its loop orders to BellSouth via fax, because BellSouth has not yet (four years after the Act) implemented an application-to-application electronic interface that permits Covad to bond its back-office pre-order and order OSS. Is this an example of what BellSouth calls competitive LEC complaints that "ILEC ordering

[39] USTA Comments at 3-4.
[40] USTA Comments at 2.
[41] U S WEST Comments at 4.
[42] BellSouth Comments at 3.

systems are not as good as they could be?"[43] In fact, it is an example of BellSouth exercising its ability to delay competition by flouting the Commission's rules.[44] The FCC has stated on no fewer than three occasions (specifically, the three BellSouth section 271 applications it has rejected) that BellSouth is obligated to provide an electronic application to application OSS interface that permits competitive LECs to integrate their pre-order and order OSS. And on no fewer than three occasions, the Commission has found that BellSouth does not provide such a capability. Covad would like to implement EDI capability with BellSouth, and BellSouth is not permitting Covad to utilize the integrated OSS capabilities to which it is entitled. The fact that we are now nearly two years after the *Second Louisiana Order* and that BellSouth still has not implemented that clear Commission stricture makes it clear that the current Commission methods are not working.

GTE argues that it is not required to provide electronic access to loop pre-qualification information because "GTE does not internally pre-qualify loops for ADSL service based on loop information."[45] GTE is thus taking a four-year leap backwards, ignoring the Commission's consistent and repeated statements that the use of loop pre-qualification information by an incumbent LEC retail representative is *irrelevant* for purposes of determining whether that information must be provided to competitors. Rather, the incumbent LEC must provide electronic access to whatever loop prequalification information that incumbent possesses anywhere in its OSS. GTE wants

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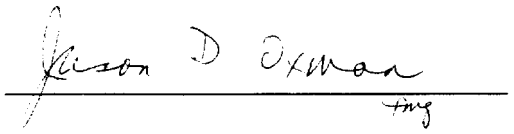
[43] BellSouth Comments at 3.

[44] GTE reasserts its longstanding commitment to facilitating local competition by stating that "requiring all ILECs to provide electronic access to loop qualification information would violate the Act's parity standard." GTE Comments at 3. This is a remarkable statement, given that the Commission in the *UNE Remand Order* already required incumbent LECs to provide electronic access to such information. Such a bold statement of intent to disregard the Commission's *existing rules* again suggests that the Commission's OSS rules may not be sufficient to protect competitive LECs from such behavior.

to ensure that competitive LECs cannot innovate by providing services that GTE does not, so GTE ensures that competitive LECs have access only to very basic information that will deny the competitive LEC the opportunity to market a full range of services to consumers. Again, it is clear that the Commission must clarify the obligation on incumbent LECs – provide direct electronic access to all information on the loop that the incumbent possesses, regardless of where that information resides, and regardless of the use to which the incumbent puts that information. Period. It is long past time to end ridiculous games like the one GTE is now playing to block competition.

For the reasons stated herein, and in Covad's initial comments, the petition of ALTS should be granted.

Respectfully submitted,



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[45] GTE Comments at 14, n. 37.